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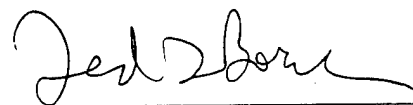
TARGETING AFTER OPERATION ALLIED FORCE:
HAS THE LAW CHANGED FOR CINCs AND THEIR PLANNERS?
by

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A paper submitted to the Dean of Academics for the Naval War College Foundation
Award essay competition.

The contents of this paper reflect my own personal views and are not necessarily
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Abstract

TARGETING AFTER OPERATION ALLIED FORCE: HAS THE LAW CHANGED FOR CINC's AND THEIR PLANNERS?

Recent reports published by Amnesty International (AI) and Human Rights Watch (HRW) charge that North Atlantic Treaty Organization (NATO) forces in Operation ALLIED FORCE selected and attacked targets in violation of the Law of Armed Conflict. If these allegations are true, it follows that General Wesley K. Clark, the CINC with command responsibility for ALLIED FORCE, and the NATO planners sequencing and synchronizing the military operation, violated the law--with personal liability for them and state responsibility for NATO members and the United States. Additionally, if the AI and HRW charges are true, then current CINC's and their planners cannot look to ALLIED FORCE as a model for targeting in any future military operation.

An examination of the AI and HRW allegations, however, reveals that they are incorrect for two reasons: either the two organizations are wrong on the facts or, alternatively, they have misstated the law. Targets selected during ALLIED FORCE were legitimate military objectives, and were lawfully attacked. Additionally, even when excessive civilian casualties may have occurred, the circumstances surrounding these incidents do not support a conclusion that the CINC or his staff violated the Law of Armed Conflict.

As a result, ALLIED FORCE is a proper and valid model for future targeting operations.

Targeting after Operation ALLIED FORCE: Has the Law Changed for CINCs and their Planners?

Introduction

Recent reports published by Amnesty International (AI)¹ and Human Rights Watch (HRW)² charge that North Atlantic Treaty Organization (NATO) forces in Operation ALLIED FORCE selected and attacked targets in violation of the Law of Armed Conflict.³ The two high-profile organizations claim, for example, that an airstrike on a Serbian radio and television (RT) station was illegal because it was "a direct attack on a civilian object." Amnesty International and HRW further charge that the bombing of two bridges was unlawful because too many civilians were on or near the structures during the attack. Finally, AI and HWR contend that because civilians were killed during NATO attacks on military targets, their deaths necessarily meant that NATO failed to obey the law's mandate to minimize harm to non-combatants. If these and other allegations are true, it follows that General Wesley K. Clark, the CINC with command responsibility for ALLIED FORCE, and the NATO planners sequencing and synchronizing the military operation, violated the law--with personal liability for them and state responsibility for NATO members and the United States. Additionally, if the AI and HRW charges are true, then current CINCs and their planners cannot look to ALLIED FORCE as a model for targeting in any future military operation.⁴

So what is the truth? Is it illegal to attack a government-owned RT station? Must a CINC instruct a pilot to refrain from attacking a bridge if he sees civilians on it? Are a CINC and his planners responsible if a large number of civilians are killed during an

attack? After examining the law relating to targeting, and analyzing the facts and circumstances surrounding the RT station, bridges and other targets AI and HWR charge were illegally attacked, this paper concludes that they are wrong for two reasons: either the facts do not support their claims or, where the facts are not in dispute, AI and HWR have drawn conclusions based on faulty interpretations of existing international law. NATO selected and attacked legitimate military objectives. The methods and weapons used to destroy or neutralize these targets were lawful, and were proportional to the military advantage expected to be gained. Finally, NATO distinguished between combatants and non-combatants and took proper precautions to avoid injuring or killing noncombatants. Consequently, CINCs and their planners may properly look to ALLIED force as a model for future targeting operations.

Operation ALLIED FORCE

In 1998, Serbian military and police forces flooded into Kosovo and began systematically driving ethnic Albanians from their homes. Roughly 250,000 Kosovars were forced to flee and, while most of these refugees escaped to neighboring Albania and Macedonia, the Serbs killed hundreds of men, women and children in this "ethnic cleansing."⁵ After diplomatic efforts advanced by Germany, France and Italy did not lead to a negotiated settlement with Federal Republic of Yugoslavia (FRY)⁶ President Slobodan Milosevic, the United States and her NATO allies decided that only military action would stop Serbian aggression. After on-going talks at Rambouillet, France, failed to stop Serbian violence against ethnic Albanians in Kosovo, NATO launched Operation ALLIED FORCE on 24 March 1999. In a "phased" air operation involving aircraft from 13 (out of 19) NATO member states, precision-guided munitions (PGMs)⁷ were used to

hit a variety of targets, including airfields, air defense emplacements, bridges, command, control, and communication (C3) sites, and police and troop barracks. Long-range cruise missiles fired by the United States and United Kingdom hit similar targets. The desired endstate of ALLIED FORCE was "to halt or disrupt a systematic campaign of ethnic cleansing."⁸ The ways and means of reaching this endstate were based on the belief that a gradual increase in force and intensity would cause Milosevic to halt Serbian aggression in Kosovo. When ALLIED FORCE ended 78 days after it began, NATO had flown more than 38,400 sorties and released 23,600 air munitions in attacking over 900 targets. While commentators disagree "about exactly what caused Milosevic to accept NATO's conditions,"⁹ the fact remains that at the end of NATO's air operation, Serbian forces ceased their ethnic cleansing operations in Kosovo.¹⁰

The Law of Armed Conflict and Target Selection

Under the Law of Armed Conflict, all persons, places and things may be targeted if they are military objectives. As Article 52(2) of the 1977 Protocol I to the 1949 Geneva Conventions explains, these are "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."¹¹ Even when a person, place or thing qualifies as a military objective, however, it may not be attacked using any means or method. Rather, only lawful weapons may be employed.¹² Additionally, any attack on a military objective must be necessary to accomplish a military purpose. By way of example, an enemy fighter jet is a military objective but, if it cannot be flown because it is parked in the

middle of a city neighborhood miles away from a runway, bombing it is unlawful because this will not accomplish a military purpose.

While non-combatants and civilian property may never be directly targeted, the law recognizes that an attack on an otherwise lawful military objective may cause incidental injury and damage to civilians and their property. There are, however, limits on such incidental or collateral damage. In the words of Article 57(2) of Protocol I, any damage must not "be excessive in relation to the concrete and direct military advantage anticipated" (emphasis supplied) from targeting the military objective. Stated differently, collateral damage must not only be minimized, but also may not be disproportionate to any military gain. Consequently, the Law of Armed Conflict requires an attacker to respect this principle of proportionality by demanding that he "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives."¹³ (emphasis supplied)

Since the adoption of Protocol I in 1977, the principles of 'distinction' and 'proportionality' have become increasingly important in the selection and attack of targets. For example, it is now generally accepted that "even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack."¹⁴ Thus, for example, massive bombing of the type used by the Allies against Dresden in World War II is no longer lawful--principally because the tens of thousands of German civilians killed was excessive when balanced against the military need to destroy the German railway network in that city. Additionally, the development of PGMs has resulted in such bombing accuracy that a significant reduction in collateral damage has accompanied it. As a result, while the Law of Armed Conflict

has not changed--injury to civilians and their property is lawful if incidental to an otherwise legal attack on a military objective--the ability to use laser-guided ordnance means that 'dumb' bomb collateral damage 'legal' 10 years ago arguably is not acceptable today.¹⁵

Lawful military objectives that almost always satisfy the "military necessity" test include enemy aircraft, vehicles, and warships; naval and military bases; warship construction and repair facilities; military storage depots; airfields, ports, and harbors; troop concentrations and embarkation points; and lines of communication. Lawful targets also include dual-use objects like bridges, railheads, road networks, and similar transportation infrastructure used both by civilians and enemy armed forces. For example, a power generating station that supplies electricity both to military structures (e.g., C3 node and air defense site) and public facilities (e.g. civilian hospital and school) may be attacked if military necessity requires it.¹⁶ Again, however, regardless of the legitimate basis for selecting and attacking a target, any collateral damage to non-combatants and their property must not be disproportionate to the military advantage achieved in destroying or neutralizing the target. It follows that an electrical power grid may be targeted if the impact of removing this energy source from the enemy's military forces is not excessive when balanced against the effect that the loss of power will have on non-military facilities.

Finally, because "constant care shall be taken to spare the civilian population" from the effects of military operations, the Law of Armed Conflict requires that non-combatants near a legitimate military target be warned of an impending bombardment. In the language of Article 57(2)(c) of Protocol I, "effective warning shall be given of attacks

which may affect the civilian population, unless circumstances do not permit." This provision is understood to mean that a warning may be general in nature; it need not be specific if this would jeopardize mission success. Additionally, only "reasonable efforts" to warn, made when the military situation permits, are required by law.¹⁷

Finally, in targeting a legitimate military objective, an attacker may use methods that safeguard his own forces, provided he otherwise complies with the Law of Armed Conflict. In ALLIED FORCE, for example, NATO pilots avoiding FRY air defenses dropped ordnance from a "safe" altitude of 15,000 feet. This was entirely lawful, as NATO's PGM-use permitted the alliance to discriminate between military and non-military objects; protecting the force did not violate the principle of distinction.

In sum, the Law of Armed Conflict requires that each target satisfy the definition of military objective; that the means selected in attacking the target be proportional to the military advantage gained; and that incidental damage to civilians and their property be minimized.¹⁸ And, to ensure that every U.S. military operation follows these legal requirements,¹⁹ judge advocates are integrated into military planning and operations at all levels. As a result, a military lawyer reviews every target for 'legal sufficiency' prior to any attack.²⁰

Legal Analysis of Specific Targets Attacked in ALLIED FORCE

Amnesty International and HRW claim that NATO's attacks on at least five targets were unlawful because the targets either were (1) not lawful military objectives; or (2) the attack accomplished no "definite military advantage;" or (3) the bombardment resulted in excessive and disproportionate collateral damage.²¹ A closer examination of

the five cases, however, shows that AI and HRW either are wrong on the facts or have misinterpreted the law, or both.

Laser-guided Bomb Attack on the Grdelica Railway Bridge. On 12 April 1999, an American F-15E launched a laser-guided bomb to destroy a railway bridge in Grdelica, Serbia. While the bomb was on its way to the target, a passenger train came onto the bridge, and the bomb hit it rather than the bridge. As General Clark explained at a press conference on 13 April, the pilot realized that he had missed his target. Consequently, he "came back around to try to strike a different point on the bridge because he was trying to do [his] job to take the bridge down."²² Taking aim "at the opposite end [of the bridge] from where the train had come," the pilot launched a second PGM. During this time, however, the train had moved as a result of the earlier bomb impact--and it was hit again. Some 10 civilians riding in the train were killed, and "at least" 15 injured.²³

NATO planners selected the Grdelica bridge for attack because it was part of a resupply route for Serb forces in Kosovo, and AI and HRW acknowledge that this military use made it a legitimate target. Nonetheless, these organizations claim that the attack was illegal for two reasons: First, NATO violated the principle of distinction when the F15E pilot did not delay his attack while there was "civilian traffic" on the bridge."²⁴ Second, NATO violated the principle of proportionality because the civilian deaths were "excessive in relation to the concrete and direct military advantage anticipated."²⁵ In essence, AI and HWR charged that, as there was no need to attack the bridge at that particular moment in time--the structure could have been destroyed 10 minutes later

when the passenger train was safely across--the bombardment violated the principle of proportionality.

An examination of the Law of Armed Conflict shows that AI and HRW are correct in concluding that it was unlawful to attack the Grdelica bridge while a passenger train was on it. This is because, while the bridge was a legitimate target, it could have been attacked when free of civilian train traffic; there is no evidence that mission success would have been jeopardized if the NATO F15E 'Strike Eagle' had returned at a later time. That said, AI and HRW's legal conclusions are irrelevant, as the facts show that the F15E pilot and weapons systems officer did not know that the train was on the bridge until it was too late to prevent collateral damage from the first bomb. As General Clark explained, the pilot launched his first laser-guided bomb while located "many miles" from the target; he "was not able to put his eyes on the bridge" from this distance. Over the next few minutes, as the pilot and weapons systems officer, closing on the Grdelica bridge at a very high speed, tracked the bomb's trajectory on a 5-inch video screen, all seemed in order. Then, "at the very last instant with less than a second to go," the train came upon the bridge and was struck.²⁶ From this sequence of events, it is apparent that there was no intent to harm civilians with the first electro-optical guided bomb. Moreover, as the F15E intended for its second bomb to hit a point on the bridge some distance away from the train, that it in fact struck the train likewise was an accident. An independent investigation conducted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) confirmed NATO's claims that the civilian deaths and injuries at Grdelica were unintended.²⁷ The lesson to be learned is that, while military operations must be conducted in accordance with the Law of Armed Conflict, criminal

responsibility requires an intent to violate the law. Consequently, an attacker who acts reasonably in bombing an otherwise legitimate target has a defense to the charge that excessive collateral damage occurred. As what happened at Grdelica was a tragic accident--and not the result of intentional or reckless conduct--the CINC and his planners had no command or individual responsibility for it.²⁸

Bombing of the Refugees on the Djakovica Road. On 14 April 1999, for about two hours in the afternoon, NATO F16 and Jaguar warplanes attacked two vehicle convoys travelling on the Djakovica Road in Kosovo. The convoys were targeted because NATO believed they consisted of Serb special police forces that had been setting fire to civilian housing in order to drive Albanian Kosovars from their homes. The targets were identified and ordnance released from an altitude of 15,000 feet; to fly lower would have risked being hit by FRY air defenses. The attack was successful, in that many vehicles in the convoys were destroyed or badly damaged. At some point during the bombing, however, NATO learned that the convoy might contain "a mix of military and civilian vehicles" and, wanting to avoid collateral damage to civilians, suspended the attack until more was known about the targets. Unfortunately, it was too late: some 70 civilian men, women, and children were killed and about 100 injured. Most of the vehicles in the convoy turned out to be farm tractors.

AI and HRW charge that the NATO attack was unlawful because NATO's interests in protecting its own pilots from danger caused it to ignore the principle of distinction. That is, by flying at 15,000 feet to avoid FRY surface-to-air missiles, NATO attackers were unable to distinguish between military objectives and non-combatants and

their property. NATO countered that, as the pilots believed they were seeing and attacking military vehicles, the civilian deaths and injuries were accidental.

Was the bombing of the Djakovica road refugees a war crime? No. The F16 and Jaguar pilots believed they were attacking military vehicles belonging to FRY special police units conducting ethnic cleansing in the area. Based on the danger to them from enemy air defenses, it was reasonable for the NATO warplanes to operate at an attack altitude of 15,000 feet. Finally, while civilians were killed, their deaths were not the result of an intentional or reckless failure to honor the principle of distinction. Just as it had with the Grdelica incident, the ICTY also concluded that NATO had acted reasonably at Djakovica.²⁹

Missile attack on Serbian Radio and Television Station. On 23 April 1999, U.S. missiles³⁰ struck the downtown Belgrade studios of a Serbian-owned RT station.³¹ The facility housed commercial telephone, fiber optic cable, high frequency radio and microwave communication equipment. It was connected with more than 100 radio relay sites in the FRY and, while principally a civilian RT network, NATO intelligence determined that this commercial system was integrated with enemy strategic and operational C3. As NATO officials explained at a press conference held after the attack, "military traffic [was] routed through the civilian system" and the RT station's equipment was being used "to support the activities of FRY military and special police forces."³²

About 12 April, NATO had issued a general warning³³ to Western media outlets that the RT station might be attacked, and the FRY learned from them that the RT facility was a target. When the facility was not immediately bombed, however, the FRY government apparently disregarded the warning³⁴--and failed to inform the RT station's

staff. Consequently, when NATO ordnance hit the facility on 23 April, between 10 and 17 civilians--technicians, security workers, and makeup artists--were killed, and about the same number wounded.³⁵

According to AI and HWR, the attack "was a deliberate attack on a civilian object and as such constitutes a war crime."³⁶ They argue that as the RT station transmitted civilian programming only, it could not be a proper military objective because it did not make "an effective contribution to military action." Additionally, AI and HWR charge that bombing the RT facility was illegal because, even if it satisfied the military objective test, its destruction did not give NATO the "definite military advantage" required by Article 52(2) of Protocol I. As the RT station was back in operation within several hours of the attack, AI and HWR argue that this necessarily means that bombarding the RT station had little military utility. Alternatively, AI and HWR maintain that the attack was illegal because civilians killed in the attack were excessive in relation to any military advantage gained.³⁷

Was it lawful to target the Serbian radio and television station? Yes. The radio and television site had a dual-use: it broadcast civilian programming but also was an integral part of the FRY/Serbian military C3 network. This made it a lawful military objective. Additionally, the rationale for targeting the RT facility was to degrade the enemy's strategic and operational C3 capabilities--the 'definite military advantage' required by Protocol I. That the attack in fact did not permanently neutralize enemy C3 does not make it any less legal. Finally, even if one assumes for the sake of argument that the civilian casualties were excessive, the true cause of this collateral damage was not NATO's bombardment. On the contrary, the deaths and injuries resulted from the

FRY's failure to protect its own citizens in light of the warning received some 10 days earlier. If the Milosevic government had informed the RT employees that their workplace was a possible target, these civilians would not have been in the building when it was hit,³⁸ and the missiles most likely would have harmed no one.

One more issue deserves comment. British Prime Minister Tony Blair and other NATO officials suggested that propaganda broadcasts made by the RT station also justified its attack. Not surprisingly, AI and HWR harshly criticized this view, claiming that there was no legal basis for it. The ICTY committee examining the matter agreed with AI and HRW that this rationale probably could not be the sole basis for an attack. The committee, however, determined that NATO's attack was lawful because its propaganda justification was "an incidental (albeit complementary) aim of its primary goal of disabling the Serbian military command and control system." But, while agreeing with AI and HRW that the station's pro-government TV and radio news stories did not transform it into a military objective, the ICTY cautioned that, had the RT station gone beyond broadcasting propaganda and incited its listeners to kill Albanian Kosovars or engage crimes against humanity, such transmissions would have made the RT site a lawful military objective.³⁹

Attack on the Lunane Bridge. On 1 May 1999, in the middle of the day, NATO warplanes bombed the Lunane bridge in Kosovo. Apparently the bridge itself suffered only minimal damage, but a civilian bus on the bridge during the attack was blown in half. An unknown number of civilians were killed.⁴⁰

No one--including AI and HWR--dispute that the bridge was a legitimate military objective, as it was on the main resupply road between Nis, Serbia's second largest city,

and Pristina, the capital of Kosovo. Rather, AI and HWR charged that NATO violated the Law of Armed Conflict because the alliance "did not take the precautionary steps necessary to avoid civilian casualties." The two organizations insist that NATO could have attacked the bridge at night, when civilian traffic across it was reduced.

Alternatively, AI and HRW argue that, by attacking the bridge when a civilian bus was crossing it, the NATO pilots necessarily ignored the presence of non-combatants and disregarded the principles of distinction and proportionality. AI and HRW reason that if NATO was conducting aerial operations in accordance with the Law of Armed Conflict, its pilots would have seen the civilian bus on the bridge. Then, realizing that attacking the bridge at that moment likely would result in excessive collateral damage, the pilots would not have released their ordnance. On the contrary, they would have halted the attack and resumed it only after the bus had crossed the bridge to safety.

What is the truth? Did NATO violate the law because its attack on a legitimate military objective also resulted in civilian casualties? No. At a 2 May 1999 press conference, a NATO spokesman explained that the bus crossed the bridge "after weapons release" and that there had been no intent to target it or its passengers. Interestingly, when asked if NATO could conduct its attacks on bridges at night--so as to minimize the danger to civilian buses and trains--the NATO spokesman said:

"... we did not target the bus as we have not targeted earlier the train. We target bridges and I am sure that the Serb authorities know that these bridges are of extreme value to their lines of communications and when they allow public traffic over these bridges, then they risk a lot of lives of their own citizens."⁴¹

The reference to Grdelica train indicates that NATO viewed the Lunane bridge as a similar situation: the attacking pilots intended to destroy a legitimate military objective.

When their ordnance struck a civilian bus, this was an accident. While NATO chose to

characterize the collateral damage at Lunane as a mistake, it indicated that the FRY authorities were putting their own citizens at risk in permitting these civilians to continue using structures that were almost certain to be targeted. Assuming that the damage to the bus and its passengers was accidental, it follows that NATO did not violate the Law of Armed Conflict. On the contrary, as the FRY government no doubt understood that the bridge was a lawful military objective, it was the FRY that arguably violated the Law of Armed Conflict. This is because Article 58(c) of Protocol I requires government officials to take "necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations."⁴² When the FRY allowed its citizens to use this and similar transportation structures, it put their lives at risk. At Lunane, the consequences were tragic.

Bombardment of Korisa Village. During the night of 13-14 May 1999, three NATO aircraft dropped 10 laser-guided and gravity bombs on Korisa, a village located on the highway between Prizren and Pristina. The primary target was a Serbian military camp and command post located a short distance from the Korisa. NATO intelligence believed that there were no civilians in the immediate area. In any event, the NATO pilots "visually identified" an armored personnel carrier, 10 artillery pieces, and "dug-in military reveted positions" prior to dropping their bombs.⁴³ While the attack on the military objective was a success, the bombs also struck ethnic Albanian refugees living nearby. A "relatively large number of civilians"--as many as 50--were killed and a roughly equal number injured.⁴⁴ Subsequent investigations have not disclosed why these men, women and children were present in the area. It may have been simply fortuitous that they encamped near the Korisa military base. There was, however, also evidence

that FRY forces had taken up positions in the village and then forced refugees to remain nearby as "human shields."⁴⁵

While acknowledging that the military command post was a legitimate military target, and agreeing that it was a serious violation of the law for FRY forces to use the refugees as human shields,⁴⁶ AI and HRW nonetheless maintain that NATO's attack was unlawful. This is because NATO's pilots "failed to take sufficient precautionary measures to ascertain that there were no civilians present" before they dropped their bombs. The high number of civilian casualties, AI and HRW maintain, were excessive in relation to the military gain--a violation of the principle of proportionality.⁴⁷

The basic problem with the stance taken by AI and HRW is that it does not comport with existing law. NATO forces attacked a legitimate military objective. NATO intelligence officers believed that no civilians were in the area, and the pilots did not see signs of refugees prior to dropping their ordnance. These factors alone cut against any conclusion that the civilian deaths resulted from any NATO failure. This is because, if the CINC authorizing the aerial attack, and the NATO officers planning it, did not know there were civilians present--and it was reasonable for them to lack this information--the law gives them a 'mistake of fact' defense. After all, the history of warfare is replete with examples of how the 'fog of war' results in unintended consequences--especially harm to innocent civilian men, women and children. While such damage is always regrettable, it does not follow that there is personal or state responsibility for it. No wonder the ICTY committee investigating the Korisa attack concluded that "credible information available is not sufficient to tend to show that a

crime . . . has been committed by the aircrew or by superiors in the NATO chain of command."⁴⁸

Conclusion

NATO members flew 38,400 sorties against 900 targets in 78 days. Roughly 500 civilians were killed.⁴⁹ While this loss of life is both sad and regrettable, the ratio of sorties to civilian deaths is more than 75 to 1. This ratio certainly supports the conclusion that NATO tried to minimize casualties, and conducted ALLIED FORCE in accordance with the Law of Armed Conflict.

For high-profile groups like AI and HRW, however, civilian casualties or other collateral damage will never be acceptable. This is because both organizations have the not-so-hidden agenda "to promote rules making the conduct of war impossible in order to end warfare itself."⁵⁰ Consequently, in applying the law to NATO targeting decisions in Operation ALLIED FORCE, AI and HRW steadfastly insisted that the actions of General Clark and his planners--and operators for that matter--were governed by 'hard and fast' rules.

The reality, however, is that the Law of Armed Conflict is not a collection of inflexible rules. Thus, for example, there is no requirement for an attacker to warn civilians near a target of the specific time and place of a future attack. On the contrary, because the Law of Armed Conflict seeks to regulate rather than outlaw military operations, the law requires only that "reasonable efforts" be made to warn, and then only when the military situation permits. Amnesty International and HRW, however, seek to

convince NATO member states, the news media, and the public, that there always must be a warning to civilians prior to an attack.

This insistence that the Law of Armed Conflict is like the Ten Commandments is dangerous for two reasons. First, when AI and HWR claim that NATO committed war crimes, some individuals and governments may believe that this is true. This threatens to deprive the United States and NATO of the moral high ground---an important component of achieving mission success. And, if America's friends believe that she is selecting and attacking targets in violation of the law, they will resist future military coalition operations in which the United States participates--a direct threat to our national security strategy of engagement. Second, such false claims have the potential to restrict a CINC's flexibility in carrying out his warfighting mission. As George Orwell demonstrated in his novel 1984, if falsehoods are repeated enough times, there is a real danger that they will be believed as true. It follows that if AI and HWR repeat their allegations often enough, our own leaders--in Congress, the White House, and the Pentagon--may believe that they are valid. And, if these high-level decision-makers then make target-related decisions based on misinformation about the law, the end result will be that a CINC's warfighting actions will be restricted. It follows that it is critical for leaders at the strategic and operational levels of war to understand that NATO's attacks on targets in ALLIED FORCE were entirely lawful. The Law of Armed Conflict did not change before, during or after ALLIED FORCE. Only legitimate military objectives were targeted and attacked, and any collateral damage that occurred as a result of those attacks was not a violation of the law. It follows that CINCs and their planners can look to ALLIED FORCE as a model for future targeting operations.

As a combatant commander, a CINC has command responsibility for campaigns and operations, and his planners must choose lawful military objectives and plan legal attacks on those targets. But, while operating in accordance with the Law of Armed Conflict, a CINC and his planners--and the judge advocates serving them--must be just as vigilant in countering those who would improperly restrict the lawful waging of war.

NOTES

¹ Amnesty International, founded in 1961, describes itself as "a Nobel Prize winning grassroots activist organization with over one-million members world wide." AI works to "free all prisoners of conscience . . . ensure fair and prompt trials for political prisoners . . . abolish the death penalty . . . [and] end extrajudicial executions and 'disappearances.'" For more information on AI, see <www.aiusa.org> U.S. joint doctrine categorizes AI as a nongovernmental organization. Joint Pub 3-08, Interagency Coordination During Joint Operations Vol. I (Washington, D.C.: Government Printing Office, 1996), p. GL-10.

² Human Rights Watch, a nongovernmental organization like AI, was founded in 1978 as 'Helsinki Watch.' It describes itself as "the largest U.S.-based human rights organization." HWR initially monitored compliance with the human rights provisions of the Cold War era Helsinki accords but, "when the Reagan administration argued that human rights abuses by right-wing 'authoritarian' governments were more tolerable than those of left-wing 'totalitarian' governments," HWR changed its focus "to counter this double standard." HWR now investigates and works against human rights abuses worldwide. For more information on HWR, see <www.hwr.org> HRW is a nongovernmental organization.

³ The Law of Armed Conflict is a general term that includes the more restrictive categories of "Law of War" (customs and laws regulating war) and "International Humanitarian Law" (customs and laws regulating the treatment of non-combatants like civilians and prisoners of war). For the purposes of this paper, the Law of Armed Conflict includes the principles enunciated in the Hague Conventions of 1907, the Geneva Conventions of 1949, and the 1977 Protocol I to the Geneva Conventions.

⁴ Others claiming that NATO committed 'war crimes' during ALLIED FORCE joined AI and HWR. For example, Canadian law professor Michael Mandel described the bombing campaign "as a coward's war . . . not even partially legitimized by the Security Council of the United Nations." Charles Trueheart, "Taking NATO to Court," Washington Post, 20 January 2000, p. A15. This paper, however, addresses only the AI and HWR allegations.

⁵ The expression "ethnic cleansing" is relatively new. In the context of the conflict in Kosovo, the phrase means "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area." Ethnic cleansing, which has included murder, torture, arbitrary arrest and detention, rape and sexual assault, deportation, and the like, constitute 'crimes against humanity' and are a violation of international law. W. Michael Reisman and Chris T. Antonio, The Laws of War (New York: Vintage Books, 1994), 389.

⁶ The Federal Republic of Yugoslavia (FRY) consists of Serbia and Montenegro; both are sometimes called "Former Yugoslav Republics"--a reference to the Yugoslav federation

that existed during the Cold War era. Serbia, as the largest and most populous republic, dominates the FRY. Kosovo is the southernmost province of Serbia.

⁷ Ninety percent of the bombs dropped during ALLIED FORCE were PGMs, compared to only 9 percent during DESERT STORM. Eric Schmitt, "It Costs a Lot More to Kill Fewer People," New York Times, 2 May 1999, p. WK5.

⁸ Gen. Wesley K. Clark, Remarks to the American Enterprise Institute, 31 August 1999, quoted in Human Rights Watch, Report: The Crisis in Kosovo: Civilian Deaths in the NATO Air Campaign (sic). <<http://www.hrw.org/reports/2000/nato/Natbm200-01.htm>>[10 February 2000] [hereinafter HRW Report]

⁹ U.S. Department of Defense, Report to Congress: Kosovo/Operation ALLIED FORCE After Action Report, 31 January 2000, reprinted as JMO NWC 2102 (hereinafter Report to Congress: Kosovo/Operation ALLIED FORCE), p. 10.

¹⁰ For less laudatory perspectives on NATO operations in ALLIED FORCE, see Tariq Ali, "After the War," in Masters of the Universe: NATO's Balkan Crusade (New York: Verso, 2000), ix.

¹¹ Additional Protocol I (1977) to the Geneva Conventions of 1949, 1125 U.N.T.S. 3 [hereinafter Protocol I]. In 1977, Protocol I was opened for signing. The United States has refused to sign the treaty, and it probably will never be presented to the U.S. Senate for ratification. That said, the United States views some provisions of Protocol I as either legally binding as customary international law or acceptable practice though not legally binding. For example, the United States accepts the legality of Article 51 (protection of the civilian population), Article 52 (general protection of civilian objects), and Article 57 (precautions in attack)--all of which govern the selection and attack of targets. Additionally, regardless of the legal status of Protocol I vis-à-vis the United States, all other NATO members have ratified Protocol I. It follows that, as ALLIED FORCE was conducted by a 13-member coalition, 12 of whom had ratified Protocol I, its provisions applied to all military operations.

¹² Weapons may be illegal per se or illegal by an improper use. Biological and chemical weapons are per se illegal. Certain projectiles (i.e. 'dum-dum' bullets) also are outlawed. An otherwise legal weapon chosen with an intent to cause unnecessary suffering would be an example of improper, and therefore illegal use. In any event, every weapon in the U.S. inventory must be reviewed for legality under the Law of War. For more on this requirement, see U.S. Army Judge Advocate General's School, Operational Law Handbook (Charlottesville, Va.: Judge Advocate General's School, 2000), 5-11.

¹³ Protocol I, Article 48.

¹⁴ International Court of Justice, "Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons," 35 Intl Legal Materials (1996): 936.

¹⁵ There are a number of issues raised by this development. There is currently no international legal requirement to use PGMs. That said, a warfighting practice (i.e. using PGMs) can, over time, affect customary international law. If this in fact occurs, does it mean that the United States, with a large number of PGMs in its ordnance inventory, is permitted less collateral damage than another country with a low-technology 'dumb' bomb arsenal? If the United States no longer has PGMs in its arsenal, may it resort to gravity bombs? Legal experts disagree on these and other related questions. For a good discussion of the PGMs-collateral damage issue, see Stuart W. Belt, "Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas," 47 Naval Law Review (2000): 115-175; C. B. Shotwell, "Economy and Humanity in the Use of Force: A Look at the Aerial Rules of Engagement in the 1991 Gulf War," Journal of Legal Studies (1993): 27-29.

¹⁶ For an exhaustive list of proper targets, see Department of the Navy, Naval Warfare Publication 1-14M/U.S. Marine Corps MCPW 5-2.1, The Commander's Handbook on the Law of Naval Operations (October 1995), para. 8.1.1.

¹⁷ Ibid., para. 8.5.2; Reisman and Antonio, 92-93.

¹⁸ Despite the clear and unequivocal requirements of the law, a recent article authored by two Air Force officers claims that a target should only be attacked if this is "moral" and "consistent with our cultural norms." Jeffrey L. Gingras and Tomislav Z. Ruby, "Morality and Modern Air War," Joint Forces Quarterly (Summer 2000): 109. Fortunately, there is no legal basis for this foolish idea.

¹⁹ DoD Directive 5100.77 requires the U.S. Armed Forces "to comply with the law of war in the conduct of military operations and related activities." Joint Pub 1 echoes this requirement in stating that "the Armed Forces of the United States must account for our actions" in conducting military operations. (emphasis in original) Joint Pub 1, Joint Warfare of the Armed Forces of the United States (Washington, D.C.: Government Printing Office, 10 January 1995), ix.

²⁰ Judge advocates at the U.S. European Command carefully evaluated each ALLIED FORCE target, and advised General Clark and his planners and operators on the legality of selecting and attacking each and every target. Col Warren D. Hall III, Staff Judge Advocate, U.S. European Command (EUCOM), Stuttgart, Germany, telephone interview by author, 20 April 2001; LtCol Tony E. Montgomery, Deputy Staff Judge Advocate & Chief, Operational Law Division, EUCOM, Stuttgart, Germany, Email interview by author, 27 April 2001. See also, Michael Ignatieff, Virtual War. New York: Metropolitan Books (2000), 197-98.

²¹ Amnesty International, Report: NATO/Federal Republic of Yugoslavia: Collateral Damage or Unlawful Killings? <<http://web.amnesty.org/ai.nsf/Index/EUR700182000?OpenDocument&of=COUNTRIES\YUGOSLAVI>>[11 March 2000], 2-4 [hereinafter AI Report]

²² Ibid., 23

²³ International Criminal Tribunal for the Former Yugoslavia (ICTY), Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia. Int'l Legal Materials 39 (2000): 1273. [hereinafter ICTY Report] The ICTY was established on 25 May 1993 by U.N. Security Council Resolution 827. The tribunal's mission is to prosecute persons responsible for serious violations of humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined. Since its creation, the ICTY has heard criminal cases involving mass killings, the organized detention and rape of women, and the practice of 'ethnic cleansing.' After AI and HRW charged NATO with violating the Law of Armed Conflict during ALLIED FORCE, a committee appointed by the ICTY-prosecutor conducted an independent investigation of the allegations.

²⁴ AI Report, p. 23.

²⁵ Ibid.

²⁶ General Wesley K. Clark, Press Conference, NATO Headquarters, Brussels, 13 April 2001, quoted in ICTY Report, 1273.

²⁷ Ibid., 1275.

²⁸ Even where a CINC intends a specific act, if his intent is based on an honest (but mistaken) belief, that CINC has a defense. For example, after World War II, Generaloberst Lothar Rendulic was acquitted at Nuremberg of charges that he had forcefully driven 43,000 Norwegian civilians from their homes where he held an honest, but erroneous, belief that Soviet forces were in hot pursuit. See Shotwell, note 144.

²⁹ ICTY Report, 1277.

³⁰ Eight Tomahawk missiles were used to hit the state-run RT station in Belgrade. All in all, the United States and United Kingdom launched a total of 238 Block III Tomahawk missiles during Operation ALLIED FORCE, with 198 successfully hitting their targets. They accounted for nearly half of all government, military and police headquarters, integrated air defense systems, and electric power grids. Bryan Bender, "Tomahawk achieves new effects in Kosovo," Jane's Defence Weekly. <http://www.janes.com/defence/naval_forces/news/jdw/jdw000718_1_n.shtml>[18 July 2000]

³¹ This was a coordinated attack as, on the same night, radio-relay towers and power stations supplying electricity to these facilities were also hit. ICTY Report, 1277.

³² AI Report, 42; ICTY Report, 1277.

³³ AI Report, 33.

³⁴ HWR provides this explanation as to why the warning was disregarded. HWR Report, 12.

³⁵ HRW claims that 16 civilians were killed and 16 wounded. HWR Report, 12. The ICTY prosecutor's report, however, states that "there is some doubt over exact casualty figures." ICTY Report, 1277.

³⁶ Steven Erlanger, "Rights Group Says NATO Bombing in Yugoslavia Violated Law," New York Times, 8 June 2000, p. A8.

³⁷ AI Report, 31.

³⁸ Or, if they had chosen to continue working in the RT facility, the civilian employees would have intentionally accepted the risk of injury or death from a future NATO bombardment.

³⁹ ICTY Report, 1278-79.

⁴⁰ FRY officials claimed that 40 civilians riding on the bus were killed; NATO conceded that there were casualties but did not agree to a specific number.

⁴¹ AI Report, 35.

⁴² Protocol I, Article 48.

⁴³ AI Report, 39; ICTY Report, 1282.

⁴⁴ ICTY Report, 1282.

⁴⁵ Ibid., 40.

⁴⁶ Using civilians (or other protected persons) as human shields violates customary international law and Article 51(7) of Protocol I.

⁴⁷ AI Report, 41.

⁴⁸ ICTY Report, 1282.

⁴⁹ Human Rights Watch concludes that "as few as 489 and as many as 528 Yugoslav civilians were killed by NATO bombardments during ALLIED FORCE." HRW Report, 4.

⁵⁰ Shotwell, 44.

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